CG 11-50

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Petition of DISH Network L.L.C.	)	
f/k/a EchoStar Satellite L.L.C. for a	)	
Declaratory Ruling	)	**Docket No. _____**
(on referral from Phillip J. Charvat v.	)	
Echostar Satellite L.L.C., NO. 09-4525)	)	
	)	
	)	

DISH NETWORK L.L.C.'S PETITION FOR CLARIFICATION AND DECLARATORY RULING

Eric Larson Zalud, *Lead Counsel*
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
Ohio Attorney Reg. No.: 0038959
2300 BP Tower
Cleveland, Ohio 44114-2378
(216) 363-4500
FAX: (216) 363-4588
ezalud@beneschlaw.com

Benjamen E. Kern
LAW OFFICE OF BENJAMEN E. KERN, LLC
Ohio Attorney Reg. No.: 0076218
5327 Westpointe Plaza Drive, PMB 207
Columbus, Ohio 43228
(614) 771-5595
FAX: (614) 878-2790
bkern@kerniplaw.com

Counsel for Petitioner
DISH Network L.L.C.

SUMMARY

This Petition arises from an Order from a civil lawsuit involving two private litigants and their disagreement as to the pertinence and interpretation of certain federal statutes and regulations as those statutes and regulations relate to disputes between private litigants. Specifically, pursuant to 47 C.F.R. § 1.2, DISH Network L.L.C. f/k/a EchoStar Satellite L.L.C. ("DISH"), respectfully submits this Petition for Clarification and Declaratory Ruling (this "Petition") relating to certain provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (the "TCPA"), and the rules and regulations implementing the TCPA, but only to the extent that those provisions, rules, and regulations govern the rights of private litigants. First, this Petition seeks a declaration that a violation of 47 U.S.C. § 227(b)(1)(B) and certain of its associated regulations may possibly give rise to liability in a private cause of action under 47 U.S.C. § 227(b)(3) *only* against the "person" that "initiates" the violative prerecorded telephone call. Second, DISH seeks clarification regarding the meaning of the "on behalf of" clause in 47 U.S.C. § 227(c)(5), as it relates to the rights of private persons and entities in private civil litigation, and a declaration that for a violative telephone call to be deemed made "on behalf of" a person, the call must have been made at the person's "direction and request," or, in the alternative, that the caller must have been under the person's "control" in accordance with federal common law agency principles.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Petition of DISH Network L.L.C.	)	
f/k/a EchoStar Satellite L.L.C. for a	)	
Declaratory Ruling	)	**Docket No. _____**
(on referral from Phillip J. Charvat v.	)	
Echostar Satellite L.L.C., NO. 09-4525)	)	
	)	
	)	

DISH NETWORK L.L.C.'S PETITION FOR CLARIFICATION AND DECLARATORY RULING

Eric Larson Zalud, *Lead Counsel*
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
Ohio Attorney Reg. No.: 0038959
2300 BP Tower
Cleveland, Ohio 44114-2378
(216) 363-4500
FAX: (216) 363-4588
ezalud@beneschlaw.com

Benjamen E. Kern
LAW OFFICE OF BENJAMEN E. KERN, LLC
Ohio Attorney Reg. No.: 0076218
5327 Westpointe Plaza Drive, PMB 207
Columbus, Ohio 43228
(614) 771-5595
FAX: (614) 878-2790
bkern@kerniplaw.com

Counsel for Petitioner
DISH Network L.L.C.

TABLE OF CONTENTS

Page

Introduction 1

Background and Basis for Request for Relief..... 3

Argument..... 4

I. A Violation Of 47 U.S.C. § 227(b)(1)(B), 47 C.F.R. § 64.1200(a)(2), 47 C.F.R. § 64.1200(b)(1), Or 47 C.F.R. § 64.1200(b)(2), Gives Rise To Liability In A Private Cause Of Action Under 47 U.S.C. § 227(b)(3) *Only* Against The Person That Initiates The Violative Prerecorded Telephone Call 4

A. The Prerecorded Call Provisions Are Clear On Their Face..... 4

B. Congress Intended Disparate Treatment Between § 227(b)(3) And § 227(c)(5) With Respect To Vicarious Liability 9

II. The Commission Should Declare That For A Violative Telephone Call To Be Deemed Made "on behalf of" A Person, The Call Must Have Been Made At The Person's "direction and request."..... 13

III. In The Alternative, The Commission Should Declare That For A Violative Telephone Call To Be Deemed Made "on behalf of" A Person, The Telemarketer Must Be Under The "Control" Of The Person According To Federal Common Law Agency Principles..... 15

Conclusion..... 16

INTRODUCTION

Pursuant to 47 C.F.R. § 1.2,[1] DISH Network L.L.C. f/k/a EchoStar Satellite L.L.C. ("DISH"), respectfully submits this Petition for Clarification and Declaratory Ruling (this "Petition") by the Federal Communications Commission (the "Commission") relating to certain provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (the "TCPA"), and the rules and regulations implementing the TCPA, but only to the extent that those provisions, rules, and regulations govern the rights of private litigants. First, this Petition seeks a declaration that a violation of 47 U.S.C. § 227(b)(1)(B)[2] and certain of its associated regulations, specifically 47 C.F.R. § 64.1200(a)(2),[3] 47 C.F.R. § 64.1200(b)(1),[4] and 47 C.F.R. § 64.1200(b)(2),[5] gives rise to liability in a private cause of action under 47 U.S.C. § 227(b)(3)[6] *only* against the "person"[7] that

---

[1] 47 C.F.R. § 1.2 provides: "The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

[2] 47 U.S.C. § 227(b)(1)(B) provides, in pertinent part: "It shall be unlawful for any person . . . to *initiate* any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party . . . ."

[3] 47 C.F.R. § 64.1200(a)(2) provides, in pertinent part: "No person or entity may: . . . *Initiate* any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party."

[4] 47 C.F.R. § 64.1200(b)(1) provides, in pertinent part: "All artificial or prerecorded telephone messages shall: At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business . . . must be stated."

[5] 47 C.F.R. § 64.1200(b)(2) provides, in pertinent part: "All artificial or prerecorded telephone messages shall: . . . During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual."

[6] 47 U.S.C. § 227(b)(3) provides, in pertinent part: "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for

"initiates" the violative prerecorded telephone call. Second, DISH seeks clarification regarding the meaning of the "on behalf of" clause in 47 U.S.C. § 227(c)(5),[8] and a declaration that for a violative telephone call to be deemed made "on behalf of" a person, the call must have been made at the person's "direction and request,"[9] or, in the alternative, that the caller must have been under the person's "control" in accordance with federal common law agency principles.[10]

The requested clarification and declaration, if issued by the Commission, will: (1) provide certainty to "sellers"[11] and "telemarketers"[12] with respect to their respective compliance obligations under the TCPA; and (2) balance accessibility of the courts to consumers to enforce the TCPA, with the legitimate interest of private businesses to be free from the threat of misapplied, profit-driven lawsuits brought under the TCPA.

---

actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or (C) both such actions."

[7] The term "person" is defined in 47 U.S.C. § 153(39) to include "an individual, partnership, association, joint-stock company, trust, or corporation."

[8] 47 U.S.C. § 227(c)(5) provides for a private cause of action for an individual who "has received more than one telephone call within any 12-month period *by or on behalf of* the same entity in violation of the regulations prescribed under" 47 U.S.C. § 227(c).

[9] *See Worsham v. Nationwide Ins. Agency*, 772 A.2d 868, 878 (Md. Ct. App. 2001) ("Nationwide can be liable for calls that an independent contractor makes at Nationwide's direction and request.").

[10] *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444-45 (2003); *see also Gulino v. New York State Educ. Depart.*, 460 F.3d 361, 371 (2nd Cir. 2006).

[11] The term "seller" is defined in 47 C.F.R. § 64.1200(f)(5) as "the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."

[12] The term "telemarketer" is defined in 47 C.F.R. § 64.1200(f)(6) as "the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."

BACKGROUND AND BASIS FOR REQUEST FOR RELIEF

On December 28, 2010, the United States Court of Appeals for the Sixth Circuit issued an "Opinion" referring *Charvat v. EchoStar Satellite L.L.C.*, C.A. No. 09-4525, to the Commission under the doctrine of primary jurisdiction.[13] *Charvat* involves claims by a serial TCPA profiteer against the defendant, EchoStar Satellite L.L.C. n/k/a DISH Network L.L.C. (the Petitioner herein), for calls that the defendant did not initiate. The Sixth Circuit framed the issue before it as follows:[14]

> At the heart of this case (and of Charvat's appeal) is the question whether the Telephone Act and its accompanying regulations permit Charvat to recover damages from EchoStar, an entity that did not place any illegal calls to him but whose independent contractors did.

As the Sixth Circuit correctly concluded, "[t]he answer turns on the meaning of several provisions of the Telephone Act and its regulations."[15]

During the course of the *Charvat* appeal before the Sixth Circuit, the court sought guidance from the Commission on multiple issues.[16] The Commission submitted an *amicus* brief touching on the issues; but the Commission ultimately suggested that the Sixth Circuit refer at least part of the case to the Commission under the doctrine of primary jurisdiction, to fully explore the issues. The Sixth

---

[13] 2010 U.S. App. LEXIS 26404.

[14] *Id.*, at *13.

[15] *Id.*

Circuit thereafter referred the case, noting that "[t]he FCC has agreed to issue a prompt ruling if the parties seek a decision from the agency."[17] DISH now files the instant Petition for Clarification and Declaratory Ruling.

ARGUMENT

I. A Violation Of 47 U.S.C. § 227(b)(1)(B), 47 C.F.R. § 64.1200(a)(2), 47 C.F.R. § 64.1200(b)(1), Or 47 C.F.R. § 64.1200(b)(2), Gives Rise To Liability In A Private Cause Of Action Under 47 U.S.C. § 227(b)(3) *Only* Against The Person That Initiates The Violative Prerecorded Telephone Call.

A. The Prerecorded Call Provisions Are Clear On Their Face.

The prerecorded call provisions of the TCPA, 47 U.S.C. §§ 227(b)(1)(B) and (b)(3), and the pertinent regulations implementing § 227(b), 47 C.F.R. § 64.1200(a)(2), 47 C.F.R. § 64.1200(b)(1), and 47 C.F.R. § 64.1200(b)(2), are clear and unambiguous. In 47 U.S.C. § 227(b)(1)(B), Congress chose to attribute liability only to the person that "initiate[d]"[18] the violative prerecorded call. Congress chose not to include the phrases "on behalf of," "on whose behalf," or any similar phrase giving rise to vicarious liability. 47 U.S.C. § 227(b)(1)(B) provides, in pertinent part:

---

[16] *See id.*, at *15.

[17] *See id.*, at *20-21.

[18] The TCPA and its regulations do not define the term "initiate." When Congress does not define terms in a statute, the terms must be construed "according to their ordinary and natural meanings." *United States v. Herrera*, 29 F. Supp. 2d 756, 760 (N.D. Tex. 1998). In *Herrera*, the court examined another federal statute that did not define the term "initiate." The court found that "'initiate' commonly means to 'commence; start; [or] introduce.'" *Id.* (quoting Black's Law Dictionary at 784). Thus, with respect to 47 U.S.C. § 227(b)(1)(B), the person that

> It shall be unlawful for any person . . . to *initiate* any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party . . . .

(Emphasis added). In consistent fashion, the statutory provision giving rise to a private cause of action for violations of "this subsection" provides:

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
>
> (A) an action based on a violation of *this subsection* or the regulations prescribed under *this subsection* to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that *the defendant* willfully or knowingly violated *this subsection* or the regulations prescribed under *this subsection*, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(Emphasis added).[19] A careful reading of § 227(b)(3) reveals that: (1) it also does not contain the phrase "on behalf of," "on whose behalf," or any words of similar import giving rise to vicarious liability; and (2) it refers to "the defendant," that is, one defendant—the person that initiated the call. Thus, Congress drafted the prerecorded call provisions of § 227(b) consistently and clearly. Congress

---

"initiate[s]" a call is the person that "commence[s]; start[s]; [or] introduce[s]" the call—*to wit*, in the present context, the person that actually dials the call. *Id.*

intended liability to attach to "the defendant" that "initiate[d]" the prerecorded telephone call.

"In enacting the TCPA, Congress wrote precisely."[20] Indeed, and to the extent that the Commission reads 47 U.S.C. § 227(c)(5) to impose vicarious liability (which it should not),[21] the Commission should find that Congress knew exactly how to impose liability when one person was acting "by or on behalf of" another person (that is, Congress knew how to impose vicarious liability), as evidenced by its inclusion of that language in the immediately proximate subsection of the TCPA.[22] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[23] Deliberative bodies are obligated to give effect to such a clear distinction when Congress chooses to use different language in proximate subsections of the same statute.[24] In drafting the TCPA, Congress chose to omit

---

19 47 U.S.C. § 227(b)(3).

20 *Int'l Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997).

21 It is DISH's position that Section 227(c)(5) merely creates a procedural mechanism for a private cause of action. It does not create liability, much less vicarious liability. The arguments raised above are made in alternative to this position. Notably, in referring this case to the Commission, the Sixth Circuit raised the following question: "[D]oes § 227(c)(5) create liability for entities on whose behalf calls are made even though the section is labeled only as a private right of action and even though individuals still must sue for violations of regulations." *Charvat*, 2010 U.S. App. LEXIS 26404, at *9.

22 *See, e.g.*, 47 U.S.C. § 227(c)(5).

23 *Immigration & Naturalization Serv. v. Cardozo-Fonseca*, 480 U.S. 421, 432 (1987).

24 *Russello v. United States*, 464 U.S. 16, 23 (1983).

the words "on behalf of" or any similar sentiment in § 227(b), but specifically included it in the very next subsection, § 227(c). The courts, and the Commission, must give effect to such a clear distinction.[25]

In DISH's view, the relevant regulations, as written, are entirely consistent with the plain text of §§ 227(b)(1)(B) and (b)(3). With one notable exception (*see* 47 C.F.R. § 64.1200(a)(2) and analysis, *infra*), the Commission, like Congress, chose not to include the phrase "on behalf of," "on whose behalf," or any words of similar import in the pertinent regulations prescribed under § 227(b). For example, 47 C.F.R. § 64.1200(b)(1) provides, in pertinent part:

> All artificial or prerecorded telephone messages shall: At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for *initiating* the call. If a business is responsible for *initiating* the call, the name under which the entity is registered to conduct business . . . must be stated.

(Emphasis added). 47 C.F.R. § 64.1200(b)(2), which refers to 47 C.F.R. § 64.1200(b)(1), provides, in pertinent part:

> All artificial or prerecorded telephone messages shall: . . . During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of *such business, other entity, or individual.*

(Emphasis added.) Finally, 47 C.F.R. § 64.1200(a)(2) provides in pertinent part:

---

[25] *See Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

> No person or entity may: . . . *Initiate* any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.

(Emphasis added.)[26]

At least one of the regulations promulgated according to the TCPA actually uses the terms "on whose behalf" and "initiated" differently in the same sentence of the same regulatory subsection.[27] If the term "initiate" includes not only the person that directly places a prerecorded call, but also the person on whose behalf the call was placed, then the term "seller" is redundant and superfluous to the term "telemarketer."[28] Certainly, the Commission has not engaged in redundant and superfluous drafting. Rather, the Commission has followed Congress' intent and has correctly drawn a clear distinction between the person that "initiates" a call and the person "on whose behalf" the call was initiated.

In drafting the prerecorded call provisions of § 227(b), Congress and the Commission expressly and clearly referred to the person that "initiate[s]" the prerecorded call. Congress and the Commission expressly and clearly omitted any indication that liability should attach to the person "on whose behalf" the

---

[26] The Commission specifically excepted calls "made by or *on behalf of* a tax-exempt nonprofit organization" (emphasis added) from the prohibition contained in 47 C.F.R. § 64.1200(a)(2), indicating that the Commission, like Congress, recognized the distinction between the person that initiates a call and the person on whose behalf the call is initiated.

[27] *See* 47 C.F.R. § 64.1200(f)(5) (defining a "seller," in part, as "the person or entity *on whose behalf* a telephone call or message is *initiated*.") (Emphasis added); *see also* 47 C.F.R. § 64.1200(d)(5) ("Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to *the particular business entity making the call (or on whose behalf a call is made)* . . . .").

prerecorded call was initiated. Thus, DISH simply seeks a declaration that Congress and the Commission meant what they wrote, and that a violation of 47 U.S.C. § 227(b)(1)(B), 47 C.F.R. § 64.1200(a)(2), 47 C.F.R. § 64.1200(b)(1), or 47 C.F.R. § 64.1200(b)(2), gives rise to liability in a private cause of action under 47 U.S.C. § 227(b)(3) *only* against the person that initiates the violative prerecorded telephone call.

B. Congress Intended Disparate Treatment Between § 227(b)(3) And § 227(c)(5) With Respect To Vicarious Liability.

Congress intended disparate treatment between § 227(b)(3) and § 227(c)(5).[29] When a prerecorded call in violation of § 227(b)(1)(B) occurs, a consumer is immediately permitted to bring a private cause of action under § 227(b)(3) against the person that initiated the call. A second call is not necessary. Other than those calls initiated for emergency purposes, or exempted by Commission rule or order,[30] liability is absolute. Knowledge on the part of the person initiating the call that the act of initiating the prerecorded call is a violation is not necessary.[31] In effect, a violation of § 227(b)(1)(B) is a strict liability act for the "person" that "initiated" the prerecorded call, *i.e.*, the telemarketer. The

---

[28] *See* 47 C.F.R. § 64.1200(f)(6) (defining a "telemarketer," in part, as "the person or entity that initiates a telephone call or message . . . .").

[29] As set forth above, it is DISH's position that Section 227(c)(5) merely creates a procedural mechanism for a private cause of action. It does not create liability, much less vicarious liability. Thus, as a threshold matter, DISH respectfully submits that the Commission should address whether the TCPA gives rise to vicarious liability *at all*.

[30] 47 U.S.C. § 227(b)(1)(B).

consumer has an absolute remedy. However, Congress contemporaneously recognized the severity of this result and, accordingly, contemplated liability only against the person that initiated the violative call.

Violations of the regulations prescribed under § 227(c), titled "Protection of subscriber privacy rights," are different. First, to be held liable in a private cause of action under § 227(c)(5), the consumer must have "received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under" § 227(c).[32] Thus, where Congress contemplated vicarious liability, Congress also required that the same person, or someone on behalf of that person, initiate a violative call to the same consumer at least twice within the same 12-month period.[33]

Second, generally speaking, a violation giving rise to a private cause of action under § 227(c)(5) must be predicated by a consumer's specific request to be placed on the national or a company specific do not call list.[34] Apparently recognizing the potential unfairness of holding a seller accountable for the acts of its telemarketers, Congress and the Commission put in place safeguards against strict liability for the seller. Congress insulated the seller from liability by

---

[31] *See Charvat v. Ryan*, 116 Ohio St.3d 394, 399 (Ohio 2007).

[32] 47 U.S.C. § 227(c)(5).

[33] *Id.*

[34] 47 U.S.C. § 227(c).

including in § 227(c)(5) an explicit affirmative defense where the seller has in place an adequate do not call policy.[35] The Commission drafted rules that define the contours of an adequate do not call policy.[36] In other words, where Congress opened the door to vicarious liability for a seller based on the acts of a telemarketer, Congress and the Commission made clear how a seller might take action to avoid liability.

Finally, § 227(c)(5) requires that for liability to attach to a person that did not initiate the call, the call must have been initiated "on behalf of" that person. Congress could have, but did not, provide that for liability to attach to the person, the violative call simply must have been made by the telemarketer for the purpose of selling the person's wares. Instead, Congress contemplated a more active role by that person for liability to attach.

While thoughtfully allocating liability, Congress also assured that the consumer's access to the courts is held inviolate. The consumer is free to bring a cause of action to enforce the TCPA against the person that initiated the call—the telemarketer—under either or both of § 227(b)(3) and § 227(c)(5). Under § 227(c)(5), however, the consumer may *also* bring an action against the person on whose behalf the violative telephone call was initiated—the seller. Thus, the

---

[35] 47 U.S.C. § 227(c)(5).

[36] 47 C.F.R. § 64.1200(c)(2); 47 C.F.R. § 64.1200(d).

consumer is never left without a person against which to seek a remedy. When the prerecorded call is also a violation of the regulations promulgated under § 227(c), and the call is made on behalf of a seller, the consumer has his or her choice of possible defendants (and may choose to bring a private cause of action against both the telemarketer and the seller).

The requested declaration may require the consumer, in some circumstances, to do a minimal amount of investigation in order to ascertain the identity of the telemarketer, rather than simply suing the purveyor of the goods or services being advertised in the call. While it is true that Congress intended to make enforcement of the TCPA "as easy as possible,"[37] this stated intention is not tantamount to removing any "Rule 11"[38] obligation on the part of the consumer to conduct "an inquiry reasonable under the circumstances" prior to filing a private cause of action. Also, this possibility of reasonable inquiry is balanced by the Consumer's absolute right to seek recovery directly from the telemarketer.

In drafting the TCPA, Congress wrote precisely. In attributing liability under the TCPA, Congress acted thoughtfully and wisely. The Commission should give effect to Congress' unambiguous intentions and declare that a violation of 47 U.S.C. § 227(b)(1)(B), 47 C.F.R. § 64.1200(a)(2), 47 C.F.R. § 64.1200(b)(1), or 47

---

[37] 137 Cong. Rec. 30821-22 (statement of Senator Hollings).

[38] Rule 11, Federal Rules of Civil Procedure.

C.F.R. § 64.1200(b)(2), gives rise to liability in a private cause of action under 47 U.S.C. § 227(b)(3) *only* against the person that initiates the violative prerecorded telephone call.

II. The Commission Should Declare That For A Violative Telephone Call To Be Deemed Made "on behalf of" A Person, The Call Must Have Been Made At The Person's "direction and request."

As set forth above, 47 U.S.C. § 227(c)(5) provides for a private cause of action for an individual who "has received more than one telephone call within any 12-month period *by or on behalf of* the same entity in violation of the regulations prescribed under" 47 U.S.C. §227(c). (Emphasis added). Congress could have, but did not, provide that for liability to attach to the person, the violative call simply must have been made by the telemarketer for the purpose of selling the person's wares (even when the person is unaware that its wares are being sold to that consumer). Thus, more is required to attribute the bad acts of the telemarketer to the person.

In this Petition, DISH requests that the Commission declare that for a violative telephone call to be deemed made "on behalf of" a person, the call must have been made at the person's "direction and request."[39] Relevant factors are: (1) whether the telemarketer was specifically instructed to call the consumer; (2) whether the called consumer's telephone number was provided to the telemarketer

---

[39] *See Worsham v. Nationwide Ins. Agency*, 772 A.2d 868, 878 (Md. Ct. App. 2001).

by the person, as a lead or otherwise; (3) whether the person otherwise knew or should have known in advance of the call that the telemarketer was going to call the consumer, and did not object; and (4) whether the telemarketer used the person's facilities, equipment, or script to make the call.

The "direction and request" test addresses the straw-man scenario, where a seller attempts to use a third party telemarketer to perform the physical act of initiating a call, but provides the consumer's telephone number, equipment, and script that make the call possible. The test also addresses the willful blindness problem, where the seller knows that a particular consumer will be called who should not be called, but does not instruct or otherwise attempt to prohibit the telemarketer from making the call. Where the consumer shows that the telephone call was initiated at the direction and request of the seller, the consumer has recourse against both the telemarketer and the seller, under either of these scenarios.

The "direction and request" test also protects the innocent non-calling person. If a person did not provide the telemarketer—a separate legal entity using its own facilities, equipment, and call script—with the consumer's telephone number, and does not even know that a call is going to be made or has been made to a particular consumer, the person is not liable. In this instance, the consumer still has recourse against the telemarketer.

The "direction and request" test does not depend on agency principles. The factors are clear and, if present, simple to establish. The consumer always has recourse. And the innocent, but (perceived) deep-pocketed non-calling person, is free from misapplied, profit-driven lawsuits.

III. In The Alternative, The Commission Should Declare That For A Violative Telephone Call To Be Deemed Made "on behalf of" A Person, The Telemarketer Must Be Under The "Control" Of The Person According To Federal Common Law Agency Principles.

If the Commission should determine that the "direction and request" test is insufficient in any way, DISH urges the Commission to adopt the federal common law agency test. Federal common law is focused primarily on the element of control.[40] The United States Supreme Court has culled several additional factors from federal case law and the Restatement (Second) of Agency, which include at least the following:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[41]

---

[40] *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444-45 (2003) ("[T]he common-law element of control is the principal guidepost that should be followed.").

[41] *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

The federal common law agency test has the benefit of being able to be uniformly applied across all jurisdictions (many of which already apply the Restatement (Second) of Agency criteria). It is well established and easy to apply. The consumer always has recourse. And the innocent, but (perceived) deep-pocketed non-calling person, is free from misapplied, profit-driven lawsuits.

CONCLUSION

Based on the foregoing analysis, DISH seeks a declaration from the Commission that a violation of 47 U.S.C. § 227(b)(1)(B), 47 C.F.R. § 64.1200(a)(2), 47 C.F.R. § 64.1200(b)(1), or 47 C.F.R. § 64.1200(b)(2), gives rise to liability in a private cause of action under 47 U.S.C. § 227(b)(3) *only* against the person that initiates the violative prerecorded telephone call. Second, DISH seeks clarification regarding the meaning of the "on behalf of" clause in 47 U.S.C. § 227(c)(5), and a declaration that for a violative telephone call to be deemed made "on behalf of" a person, the call must have been made at the person's "direction and request," or, in the alternative, that the telemarketer must have been under the seller's "control" in accordance with federal common law agency principles.

Respectfully submitted,

Eric Larson Zalud, *Lead Counsel*
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP
2300 BP Tower

Cleveland, Ohio 44114-2378
(216) 363-4500
FAX: (216) 363-4588
ezalud@beneschlaw.com

Benjamen E. Kern
LAW OFFICE OF
BENJAMEN E. KERN, LLC
5327 Westpointe Plaza Drive, PMB 207
Columbus, Ohio 43228
(614) 771-5595
FAX: (614) 878-2790
bkern@kerniplaw.com

Counsel for Petitioner EchoStar Satellite L.L.C. n/k/a DISH Network L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **DISH Network L.L.C.'s Petition for Clarification and Declaratory Ruling** was served by regular U.S. Mail, postage prepaid, on this 21 day of February, 2011 upon the following:

Matthew P. McCue
340 Union Ave.
Framingham, MA 01702
Attorney for Philip J. Charvat

Eric Larson Zalud